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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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ARTHUR FRANKLIN MILLER, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County

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APPELLANT'S AMENDED MOTION FOR REHEARING

* * * * * *

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ARTHUR FRANKLIN MILLER, JR., Appellant

v.

THE STATE OF TEXAS, Appellee

* * * * * *

APPELLANT'S AMENDED MOTION FOR REHEARING

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now Appellant, Arthur Franklin Miller, Jr., by and through his attorneys of record, Jay Ethington and Cody L. Skipper, and respectfully submits this Amended Motion for Rehearing in the above entitled and numbered cause.

ARGUMENT AND AUTHORITIES

This Court's plurality opinion held that trial counsel's deficient performance in causing Appellant to waive his Sixth Amendment right to a jury trial was not prejudicial because there had been no showing that a reasonable jury would have awarded him probation. *Miller v. State*, No. PD-

0891-15, 2017 Tex. Crim. App. LEXIS 429, at *25 (Tex. Crim. App. Apr. 26, 2017). However, on June 23, 2017, the United States Supreme Court, in *Lee v. United States*, No. 16-327, 2017 U.S. LEXIS 4045 (2017), addressed this exact issue and ruled contrary to this Court's plurality opinion. Chief Justice Roberts, in a 6-2 decision, delivered the opinion of the Court, which held that, consistent with the Court's precedent in *Hill v. Lockhart*, a defendant's decision to forfeit his constitutional right to a jury trial based on the erroneous advice of trial counsel established the requisite prejudice to vacate his conviction and order a new trial under the Sixth Amendment. *Id*. at *20-21. *Lee* relied heavily on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), which this Court's plurality opinion cited to but failed to discuss in its original opinion.[1]

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[1] In *Flores-Ortega*, the Supreme Court stated:

> Today's case is unusual in that counsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. According to respondent, counsel's deficient performance deprived him of a notice of appeal and, hence, an appeal altogether. Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a *fair* judicial proceeding; that deficiency deprived respondent of the appellate proceeding altogether. In *Cronic*, *Penson*, and *Robbins*, we held that the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." The even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any "presumption of reliability" to judicial proceedings that never took place.

I.

The Sixth Amendment of the United States Constitution guarantees that criminal defendants have a right to a speedy and public trial by an impartial jury drawn from the state and district in which the crime occurred. U.S. CONST. AMEND. VI. The Sixth Amendment also guarantees a defendant the effective assistance of counsel at "critical stages of a criminal proceeding." *Hill*, 474 U.S. at 58. Decisions concerning basic trial rights must be made by the defendant and require that "an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Florida v. Nixon*, 543 U.S. 175, 187 (2004). These basic trial rights include the determination of "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id*. (quoting *Jones v. Barnes*, 463 U.S. 745, 751 (1983)). "[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *Strickland v. Washington*, 466 U.S. 668, 696 (1984). In interpreting the prejudice prong, the Supreme Court has identified narrow categories in which prejudice is presumed, including when there has been an "[a]ctual or constructive denial of the assistance of counsel altogether." *Id*. at 692; *see*

Flores-Ortega, 528 U.S. at 483 (internal citations omitted).

also Mickens v. Taylor, 535 U.S. 162, 166 (2002) (prejudice presumed when assistance of counsel "denied entirely or during a critical stage of the proceeding"); *McGurk v. Stenberg*, 163 F.3d 470, 473-74 (8th Cir. 1998) (counsel's failure to discover that defendant had right to jury trial and to inform defendant of that right warranted presumption of prejudice).

II.

The Supreme Court in *Lee* rejected the very argument advanced by the State in this case and accepted by this Court's plurality – that Appellant was not prejudiced because the evidence presented to the trial court showed that the outcome would not have been different had Appellant proceeded to a trial before a jury. *Lee*, 2017 U.S. LEXIS 4045, at *20 - 21. Specifically, the plurality failed to recognize that "if an attorney's deficient performance causes the waiver of a judicial proceeding to which the defendant has a right, that is ineffective assistance of counsel," regardless of a defendant's likelihood of success. *Miller*, 2017 Tex. Crim. App. LEXIS 429, at *27 (Keel, J., dissenting); *see also Lee*, 2017 U.S. LEXIS 4045, at *13, *16; *Flores-Ortega*, 528 U.S. at 484; *Hill*, 474 U.S. at 59. "The defendant does not have to show a likelihood of victory on appeal, acquittal or lower punishment; the waiver is the prejudice." *Miller*, 2017 Tex. Crim. App. LEXIS 429, at * 27 (Keel, J., dissenting); *see also Lee*, 2017 U.S. LEXIS

4045, at *12. Writing for the majority in *Lee*, Chief Justice Roberts echoed the words of Judge Keel by recognizing the fundamental error overlooked by the Government – the *Hill v. Lockhart* inquiry focuses on a defendant's *decisionmaking*, which may not turn solely on the likelihood of conviction after trial. *Lee*, 2017 U.S. LEXIS 4045, at *15; *Miller*, 2017 Tex. Crim. App. LEXIS 429, at *28 (Keel, J., dissenting) ("The different-outcome question [in *Hill*] was relevant only to the extent that it impacted the decision to plead guilty"). Here, the plurality opinion failed to address the same fundamental error relied upon by the State in this case, and in doing so, applied the incorrect standard for a prejudicial inquiry. *Miller*, 2017 Tex. Crim. App. LEXIS 429, at *31 (Keel, J., dissenting) ("[T]his Court has held [in *Johnson v. State*] that if an attorney's deficient performance causes structural error, like the waiver of a jury, the *Hill* analysis applies.").

In *Lee*, the Supreme Court stated that the prejudice prong was satisfied even though the defendant had no viable defense to his crime. *Lee*, 2017 U.S. LEXIS 4045, at *13 ("Here Lee knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected Lee's understanding of the consequences of pleading guilty."). "Rather than asking how a hypothetical trial would have played out absent the error, the Court [in *Hill*]

considered whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Id*. at *14. "[C]ommon sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial." *Id*. at *16. In other words, defense counsel's erroneous advice, which affects a defendant's decisionmaking, can still result in prejudice even if the desired outcome from the alternative process is a "highly improbable result." *Id*. at *17. "[I]n this case counsel's 'deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.'" *Id*. at *12 (quoting *Flores-Ortega*, 528 U.S. at 483). There is no presumption of reliability "where, as here, a defendant was deprived of a [judicial] proceeding altogether." *Id*. at *17 (quoting *Flores-Ortega*, 528 U.S. at 483).

Here, it is undisputed that a jury trial never took place. It is also undisputed that, like the facts in *Lee*, the State conceded that trial counsel was deficient. It is likewise undisputed that but for trial counsel's deficient performance through unlawful erroneous advice, like the facts in *Lee*,[2]

[2] At an evidentiary hearing on Lee's motion, both Lee and his plea-stage counsel testified that "deportation was the determinative issue in Lee's decision whether to accept the plea." *Lee*, 2017 U.S. LEXIS 4045, at *9.

Appellant would have pursued his constitutional right to a jury trial,[3] rather than waive the judicial proceeding in its entirety. *Lee*, 2017 U.S. LEXIS 4045 at *18 (concluding that the defendant adequately demonstrated that, but for counsel's erroneous advice regarding deportation, he would have pursued a jury trial); *Flores-Ortega*, 528 U.S. at 486 ("[W]e require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed."). Therefore, this Court cannot accord any presumption of reliability to Appellant's case – it demands a presumption of prejudice. Appellant has a constitutional right to have a jury trial and, in the face of overwhelming evidence with no realistic defense, to throw a "Hail Mary" if he so chooses. *Lee*, 2017 U.S. LEXIS 4045 at *17.

III.

Another problem created by the Court's plurality opinion is the perpetual head-scratching regarding these crucial decisions now facing all criminal law practitioners in Texas, who will be left with more questions than answers, and more confusion than guidance. Trial counsel, and even the trial court, will have to peer into a crystal ball or resort to Tasseography before procedural decisions are made at that level. *Missouri v. Frye*, 566

[3] At an evidentiary hearing on Appellant's motion, both Appellant and his family members testified that probation was the determinative issue in Appellant's decision to waive his constitutional right to a jury trial. Appellant's plea stage counsel also acknowledged such in an email to appellate counsel.

U.S. 134, 154 (2012) (Scalia, J., dissenting) ("Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis."); *John R. Sand & Gravel Co v. United States*, 552 U.S. 130, 146 (2008) (Ginsburg, J., dissenting) ("After today's decision, one will need a crystal ball to predict when this Court will reject, and when it will cling to, its prior decisions interpreting legislative texts."); *Board of Education v. Superior Court of California*, 448 U.S. 1343, 1347 (1980) ("All of this requires that a Justice cultivate some skill in the reading of tea leaves as well as in the process of legal reasoning."); *United States v. Batamula*, 823 F.3d 237, 249-50 (5th Cir. 2016) (Dennis, J., dissenting) ("[T]he majority unconscionably casts [Appellant] out in its error-filled decision based on rank speculation as to [Appellant's] fate in any future immigration proceedings. Because this resolution is inconsistent with this court's precedent, the requirements of § 2255, and the clear directives of the Supreme Court, I must respectfully dissent.").

For example, how does an attorney properly preserve error by establishing in the record a reasonable likelihood of a better outcome? Does the attorney make an offer of proof and then have a trial on the record to establish what would have happened at trial? If not, will trial counsel be ineffective? Moreover, what is the consequence of trial counsel being

ineffective regarding unlawful and erroneous advice on probation eligibility, and also in failing to present any mitigation evidence to support a sentence of probation? In that circumstance, it's clearly unlikely that any court would find that the outcome would not have been different.

To take the plurality's holding one step further, consider the following hypothetical: Attorney advises his client to take a plea bargain of two years confinement in the penitentiary because the lawyer mistakenly believes and improperly advises that his client is ineligible to receive probation from either a judge or jury. The client then waives his right to a trial, a sentencing hearing, and a presentence investigation. This realistic hypothetical makes it absolutely clear that the defendant would not have accepted the plea bargain offer and waived his constitutional right to a jury trial had the attorney correctly informed the defendant that he was actually, under the law, eligible to receive probation. Under *Miller*, how does an attorney show that there was a likelihood of a defendant receiving probation if there was no trial, no sentencing hearing, and no presentence investigation? How does any court following the holding in *Miller* make that determination?

CONCLUSION

In conclusion, the Court should acknowledge and follow the binding precedent of the United States Supreme Court that controls in this instance and find a presumption of prejudice. As the dissent clearly stated, "[t]he plurality offers unpersuasive reasons for evaluating prejudice in terms of the trial's outcome instead of Appellant's decision to waive a jury." *Miller*, 2017 Tex. Crim. App. LEXIS 429, at *29 (Keel, J., dissenting). "It is impossible to say what a jury that was never seated likely would have done in a jury trial that was never had." *Id*. at *33 (Keel, J., dissenting). Regardless of Appellant's likelihood of success at trial, his decisionmaking was prejudiced by the erroneous advice of trial counsel. *Lee*, 2017 U.S. LEXIS 4045 at *15. The plurality's conclusion simply "encourages ongoing confusion about these crucial decisions," *Miller*, 2017 Tex. Crim. App. LEXIS 429, at *35 (Keel, J., dissenting), which will now require future resolution on a case-by-case basis.

PRAYER FOR RELIEF

Wherefore, Appellant prays that his Amended Motion for Rehearing be granted, and that the case be reversed and remanded consistent with the opinion in *Lee*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 10th day of July, 2017, the Appellant's Amended Motion for Rehearing was served via certified electronic service provider to:

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